ZALEHA ARIFFIN

v.

SALMAH MD ZAIN

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: 23-73-92]
9 MAY 2001

LAND LAW: *Gifts - Inter vivos gift - Hebah - Whether there was a contractual relationship - Whether s. 16 Contracts Act 1950 applicable*

LAND LAW: *Indefeasibility of title and interests - Undue influence - Whether can render title defeasible - Whether defeasibility strictly confined to cases involving fraud, forgery and misrepresentation - National Land Code, s. 340(1), (2)*

When this civil suit was first filed, the original plaintiff was one Ibrahim Ariffin ("Ibrahim"). He had brought this action against the defendant, his niece, Salmah Md. Zain ("defendant") in his capacity as the administrator, and on behalf of the estate of his late mother Jah Hamzah ("Jah") who was also the grandmother of the defendant. However, before this matter could proceed to trial, Ibrahim passed away.

After his demise, the court appointed the present plaintiff, Zaleha Ariffin ("plaintiff") who was a sister to Ibrahim as the legal representative to represent the estate of Jah. The plaintiff and the other children of Jah were not happy with the transfer of two lots of land by Jah to the defendant, who was merely a granddaughter. The estate of Jah alleged that the transfer was a result of undue influence exerted by the defendant on Jah, while the latter was still alive, thus claiming that it was null and void. Hence, the present suit by the estate of Jah against the defendant.

Held:

[1] The transfer was by way of *hebah*, *ie*, it was a gift without consideration. Therefore the transfer of the two lots of land by Jah to the defendant was by way of a gift *inter vivos* and not by way of a contract. There was no contractual relationship between the defendant and her grandmother, Jah. Hence, s. 16 of the Contracts Act 1950 was not relevant.

[2a] Since the two lots of land were now duly registered in the name of the defendant, the provisions of s. 340(1) of the National Land Code ("the Code") prescribing the principle of indefeasibility of title would protect her proprietary rights over the lots.

[2b] Fraud, forgery and misrepresentation are among the exceptions specified in s. 340(2) of the Code. Cases of undue influence do not come within the exceptions. Therefore, the facts of this case did not fall within the exceptions to the general principle. Thus, even assuming that there was an element of undue influence in the transaction between the defendant and Jah, so long as the transaction was solely in the nature of a gift *inter vivos*, and not contractual, the defendant was still protected by the principle of indefeasibility.

[Suit dismissed with costs.]

Case(s) referred to:
Inche Noriah v. Shaik Allie Omar [1929] AC 127 ***(dist)***
Itam & Anor v. Zain [1961] 27 MLJ 55 ***(refd)***
Lim Kim Hua v. Ho Chui Lan & Anor [1996] 2 CLJ 299 ***(dist)***

Legislation referred to:
Contracts Act 1950, s. 16
Land Code of Sarawak, s. 132
National Land Code, s. 340(1), (2)

For the plaintiff - Kartar Singh; M/s Kartar Singh Dhaliwal & Co
For the defendant - Hashim Jahaya; M/s Ismael Alabas & Hashim

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Yunus J:

At the initial stage, when this civil suit was filed in 1992, the plaintiff was one Ibrahim bin Ariffin. He brought this action against the defendant, his niece, Salmah bt. Md. Zain (hereinafter shall be referred to as "Salmah"), in his capacity as the administrator, and on behalf, of the estate of his mother (the grandmother of the defendant), Jah binti Hamzah (hereinafter shall be referred to as "Jah"). However, in 1994, before this matter could proceed to trial, Ibrahim bin Ariffin passed away. After his demise, no one was appointed as the administrator of the estate of Jah. In 1995, one of his sisters by the name of Zaleha binti Ariffin, applied and, by consent of the defendant, was appointed by the court as the legal representative of Ibrahim to represent the estate of Jah.

Now, as a matter of record, Jah died on 8 February 1991.

The late Jah binti Hamzah had five children, namely:

(1) Ashari bin Awang;

(2) Saad bin Ariffin;

(3) Saibah bt. Ariffin (now deceased);

(4) Zaleha bt. Ariffin; and

(5) Ibrahim bin Ariffin (now deceased).

Ashari bin Awang (i.e. (1) above) was Jah's son through her previous marriage with one Awang (no evidence being led as to his full name), which marriage ended in a divorce. Subsequent to the divorce, she married Ariffin, the father of her other children.

Saibah bt. Ariffin (i.e. (2) above) was also known as Habibah or Bibah and was the mother of Salmah (the defendant). Saibah bt. Ariffin died earlier than her mother, Jah.

Salmah, the defendant, at the time of the trial, was 40 years of age. She is married to one Wan Sulaiman. Since the age of seven she was brought up by her grandparents, that is to say, by Jah and her husband (after the divorce with Awang), Ariffin. At first she stayed with them at Kampong Ruat, Yan.

Then her grandfather, Ariffin, died in 1974.

After her grandfather passed away, Salmah (who by then was 20 years old) and her grandmother moved to Guar Chempedak to stay with Salmah's parents (Saibah and her husband, Mohd Zain).

Subsequently, Ibrahim bin Ariffin (i.e. one of the sons of Jah and the administrator of her estate), now deceased, bought a lot adjacent to Saibah's house and built on it a house for Jah, and Jah lived in this house with Salmah.

Salmah had been looking after her grandmother, Jah, since the age of 19.

After her marriage, at the age of 23, Salmah continued to stay with Jah at the latter's house at Guar Chempedak. Later when she and her husband left Guar Chempedak to live at Simpang 3, Sungai Limau, they took along Jah to stay with them.

Now – and this is the incident that lead to the present litigation – a week before Jah died (that is, on 3 February 1991), Salmah and her father (Mohd Zain) took Jah to the district land office at Yan and there Jah transferred two lots of land belonging to her to Salmah by way of *hebah*. The lots were:

(a) SP: 45117, Lot 841, Mukim of Yan – half share; and

(b) G.M. 841, Lot 4701, Mukim Yan – two-fourth share.

The transfer, which was attested by the district land administrator, was duly registered by the land office. These lots are the subject matter of the present suit.

At the time of the transfer, Jah was about 73 years of age, asthmatic (penyakit penat), and was sickly. And just a few days before she died, Jah requested Salmah to take her back to Guar Chempedak, saying that she wanted to die at Mohd Zain's house there; and so Salmah took her to her father's (Mohd Zain's) house at Guar Chempedak, where she passed away. There is no evidence as to the actual cause of death.

The children of the late Jah, especially Ibrahim bin Ariffin and Zaleha bt. Ariffin, are not happy with the transfer of the two lots of land to Salmah. They ask: why should their late mother transfer the two lots of land to Salmah who is merely a grandchild, when they, as the children of Jah, are **waris** who are still alive and hence have a better claim to the properties? Hence the present suit by the estate of Jah against Salmah.

The estate alleges that the transfer of the two lots by Jah to Salmah was a result of undue influence exerted by Salmah on Jah, while the latter was still alive. The plaintiff claims that the transfer was null and void and prays for an order that the defendant transfers the lots to the administrator of the estate of Jah.

In their endeavour to prove their case, the estate of Jah adduced evidence, circumstantial in nature, to show undue influence. The plaintiff gave evidence:

(a) that Salmah took undue advantage of the fact that Jah was of old age, infirm, sickly, and was (allegedly) forgetful and mentally unstable (tidak waras) a few days before she died;

(b) that about a week before she died, Jah had told Zaleha and Ibrahim that she wanted Zaleha to apply for a letter of administration in respect of her properties in the event she were to die;

(c) that Jah during her lifetime never said or intimated to her children that she wanted to transfer the two lots to her grandchild, Salmah; and

(d) that neither Jah nor Salmah ever consulted any of the children of Jah before making the transfer of the two lots to Salmah.

Except the fact that Jah was of old age and sickly, plaintiff's evidence alleging (a) and (b) above are disputed by the defendant. Salmah also denied the allegation that she exerted undue influence on her grandmother and had induced the latter to transfer the two lots to her.

Encik Kartar Singh, for the plaintiff, submitted that the transfer was null and void by reason of undue influence, relying on s. 16 of the Contracts Act 1950, which reads:

16 **Undue Influence**

(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:

(a) ...

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

Learned counsel cited *Inche Noriah v. Shaik Allie Omar* [1929] AC 127 (Privy Council, Singapore).

Encik Hashim bin Jahaya, for the defendant, on the other hand, submitted that the plaintiff had failed to prove undue influence; and it is submitted further, in the alternative, that even if there had been undue influence, legally, it was irrelevant as the transfer was by way of *hebah* and not by way of a contract. It was argued that as there was no contract between the defendant and her grandmother, Jah, therefore, s. 16 of the Contracts Act was irrelevant. The defendant further submitted that her right to the lots are protected by s. 340 of the National Land Code. In support of his argument, Encik Hashim relied on *Lim Kim Hua v. Ho Chui Lan & Anor* [1996] 2 CLJ 299.

It is common ground that the transfer of the two lots was by way of *hebah* and that the transfer had been duly registered on the title.

At the outset, I wish to state my view that, by reason of the undisputed facts and the law, it is not necessary for me to assess the conflicting evidence to determine whether or not there was undue influence. For reasons which I shall give in due course, the issue whether or not there was undue influence is, to my mind, irrelevant.

But first, what is *"hebah"*? The meaning of *"hebah"* is explained by Syed Sheh Barakbah J (as he then was) in *Itam & Anor v. Zain* [1961] 27 MLJ as follows (at p. 55):

> There is no difficulty about the Malay word "Hebah" which means gift without consideration.

In my judgement, on the facts, since the transfer was by way of *hebah*, that is to say, it was a gift without consideration, therefore, the transfer of the two lots by Jah to her granddaughter, Salmah, was by way of a gift *inter vivos* and not by way of a contract. In other words, and this is important, there was no contractual relationship between the defendant and her grandmother, Jah. Since there was no contract between Salmah and her grandmother, therefore s. 16 of the Contracts Act is not relevant. Section 16 only applies to contractual relations.

It is also my judgment that since the two lots are now duly registered in the name of the defendant, Salmah, therefore, the provisions of s. 340(1) of the National Land Code prescribing the principle of indefeasibility of title protects her proprietary rights over the lots.

Section 340 of the Code provides:

> 340. **Registration to confer indefeasibility title or interest, except in certain circumstances.**
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

It is, however, true that there are exceptions to the above principle as laid down in s. 340(2) of the Code which stipulates:

> (2) The title or interest of any such person or body shall not be indefeasible:
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

But it is to be observed that the exceptions specified by the above provision are only confined to cases of fraud, forgery or misrepresentation (I shall not touch exception (c) above, as it is clearly not relevant in the context of the present case): cases of undue influence are not included in the exceptions. Therefore, the facts of the case before me do not fall within the exceptions to the general principle. In other words, even assuming that there is an element of undue influence in the transaction between the defendant and her grandmother, nevertheless, so long as the transaction is solely in the nature of a gift *inter vivos*, and not contractual, the defendant is still protected by the principle of indefeasibility.

I find the case of *Inche Noriah* – although a case on undue influence – as being irrelevant because this 1929 case, involving the disposal of land in the then British Colony of Singapore, was decided long before the Malaysian National Land Code was enacted and came into force in 1966. Further, the case did not deal with any provision or principle of law similar to the principle of indefeasibility as laid down in s. 340(1) of the Code.

Likewise, I also find the case of *Lim Kim Hua*, cited by the learned counsel for the defendant, as being irrelevant – although it is a case concerning the effect of undue influence. *Lim Kim Hua*, can be distinguished because in that case it is not clear from the reported judgment whether the transfer was purely a gift *inter vivos* or was by way of a contract. The learned judge in that case did not make any finding at the outset whether the transaction was a gift or a contract (perhaps the issue was not raised before the learned judge) but appears to assume that the transaction was a contract; for his lordship cited s. 16 of the Contracts Act. Furthermore, although the facts of that case concerned the disposal of land in Sarawak, the judgment did not discuss s. 132 of the Land Code of Sarawak (perhaps the issue was not argued before his lordship) which, like s. 340(1) of the National Land Code, codified the principle of indefeasibility of title.

In conclusion I hold that:

(a) the issue whether or not there was undue influence exerted by he defendant on her grandmother is irrelevant;

(b) as the transfer of the lots to the defendant by her grandmother was by way of *hebah*, therefore, the transfer was a gift *inter vivos* and was not contractual in nature;

(c) section 16 of the Contracts Act applies only to contractual relations and therefore does not apply to such a gift; and

(d) as the lots are now registered in the defendant's name, the principle of indefeasibility of title as provided by s. 340(1) of the National Land Code protects her proprietary right over the lots; and by reason of s. 340(2), in law, it make no difference even if there was undue influence.

The suit is therefore dismissed with costs.